APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

Nos. 15540, 15656
SEPTEMBER TERM, 1966 SEPTEMBER SESSION, 1966

GOLAY & CO., INC.,
Petitioner,
No. 15540 v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO,
Petitioner,
No. 15656 v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

} Consolidated Petitions to Review and Cross-Petition to Enforce an Order of the National Labor Relations Board.

December 1, 1966

Before HASTINGS, *Chief Judge,* KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* In Appeal No. 15540, Golay & Company petitions this court to review and set aside an order of the Board finding it guilty of unfair labor practices in violation of sections 8(a)(1) and (3). In Appeal No. 15656 the Union[1] petitions for a modification of the

[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO.

Board's order with respect to the date from which back pay was due unlawfully discharged employees. We granted leave to the Union to intervene in No. 15540 and to Golay to intervene in No. 15656, and consolidated the appeals. In each appeal the Board cross-petitions for enforcement. We order enforcement of the order with certain alterations in the decision and order.

No. 15540

Golay's four plants are located in Cambridge City, Indiana. During the period September through November 20, 1962, the Union conducted an organizational drive among Golay's approximately 350 employees. During this drive employees James, Heaston, Moistner, Covalt and Paris were laid off or discharged. Paris was discharged the morning of November 19, and during the lunch hour his fellow employees decided to strike in protest of the discharges. The next morning the strikers picketed the plant. Golay discharged thirty-four of the employees who participated in the strike and later refused to rehire eight other strikers who had not been discharged.

On November 1, 1962, the Union filed three charges, with subsequent amendments, involving alleged unfair labor practices in layoffs, discharges or terminations of employees in three of the plants. Upon these charges the General Counsel issued a consolidated complaint alleging Golay's violation of sections 8(a)(1) and (3). Hearings were conducted from April 8 to April 24, 1963. The Trial Examiner concluded that Golay had violated 8(a)(1) during the organizational period by surveillance of Union activities, by interrogating and threatening employees, by promising or granting benefits, by attempting to form a company union and by interfering with employees' rights to wear union insignia. He also concluded that the discharges of James and Paris were discriminatory in violation of 8(a)(3) and (1) but that the layoffs or discharges of Covalt, Heaston and Moistner were not discriminatory.

The Board adopted the findings and conclusions of the Examiner so far as he found violations by Golay. It disagreed with the Examiner's finding that Golay's discharges of Heaston and Moistner[2] were not 8(a)(3) and (1) violations. Golay argues that the findings and conclusions of interference and coercion in violation of 8(a)(1) and of discriminatory discharges (of James, Paris, Heaston and Moistner) in violation of 8(a)(3) and (1) are not supported by substantial evidence on the record as a whole.

We have read both the order and decision. We adopt the Board's decision against Golay with respect to these contentions as the decision of this court. We see no necessity of repeating here the discussion in the Board's decision of the Intermediate Report and Recommended Order of the Examiner, both of which are reported at 156 N.L.R.B. No. 123 (Feb. 4, 1966). The Board did not reject or set aside any credibility determinations of the Examiner. Under the limited scope of this court's jurisdiction to review Board orders we find substantial evidence in the record as a whole to justify the Board's decision and order. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

We turn now to the question of the discharges and refusals to rehire the forty-two strikers. The Trial Examiner found that the strike was precipitated by the discharge of Paris and was an unfair labor practice strike. He concluded that Golay violated 8(a)(3) and (1) because nineteeen of the thirty-four post-strike discharges were unlawful, but that of these nineteen employees, only eight were entitled to reinstatement. He found that misconduct by the other eleven, subsequent to their discharge, barred their reinstatement under section 10(c). He concluded that Golay had committed further 8(a)(3) and (1) violations by refusing to rehire the eight strikers who had not been discharged.

[2] The Board and Trial Examiner agreed that Covalt's layoff was not discriminatory.

The conduct upon which the Examiner predicated his conclusions that fifteen of the discharges were lawful and that eleven of those unlawfully discharged were not entitled to reinstatement consisted of "loitering" or wandering around the Golay plant during the afternoon of November 19, punching in at the time clock with no intention of returning to work, failing to respond to Golay's reasonable inquiries as to whether they would or would not work, and misconduct during picketing for one and one-half to two hours on the morning of November 20. He also found that one employee had carried a hammer around with him on the afternoon of the strike.

The Board disagreed with the Trial Examiner and found that all of the discharges on November 19 were in violation of 8(a)(3) and (1). It found that the conduct relied upon by the Examiner as cause for discharge was "not unprotected." It concluded that all forty-two employees were entitled to reinstatement under section 10(c).

Golay contends that the November 19 "sitdown" strike and the "mass picketing" on November 20 were unlawful, unprotected activities, that the discharges of the employees involved in those activities did not violate 8(a)(3) and (1), and that these employees are not entitled to reinstatement under section 10(c).

At least nineteen of the strikers did not participate in the alleged misconduct, at least until after their discharge. Since there is substantial evidence on the record as a whole to support findings of 8(a)(3) and (1) violations for the discharge of these nineteen strikers, we need not and do not decide whether the other discharges constituted similar violations or whether the alleged misconduct was protected. The findings with respect to the nineteen are ample to support the Board's order that Golay refrain from further discriminatory conduct. To the extent that the Board found the alleged misconduct to be protected and concluded that Golay had committed 8(a)(3) and (1) violations by discharging the other employees, we do not adopt its opinion or enforce its order.

The only question remaining is whether the strikers' alleged misconduct on November 19 and 20 bars an order of reinstatement for all forty-two employees under section 10(c).

The Golay employees "loitered" or wandered about for only one and one-half to two hours and committed no acts of violence. The alleged "sitdown" interfered with production no more than a simple cessation of work by these employees would have. In our opinion the November 19 strike did not come within the term "sitdown" strike used by the Supreme Court to describe the strike in *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), where the employees seized and retained possession of the employer's plant for nine days "without shadow of legal right." *Id.* at 252. Nor did the Golay strike amount to "seizure of control" as in *NLRB* v. *Clinchfield Coal Corp.*, 145 F.2d 66, 72 (4th Cir. 1944), where striking mine workers blocked mine entrances and prevented mining operations for more than a day.

On November 20 the Golay pickets, numbering from fifteen to seventy at various times, walked in a circle at the driveway to the company parking lot. At times they were so close together as to prevent cars from entering the lot, but some employees crossed the picket line on foot after parking outside. The Trial Examiner found that one employee crossing the line had been struck by an object, and that one other employee was threatened several times. The alleged objectionable conduct lasted for no more than two hours, from 5:30 to 7:30 a.m., and there was no evidence that any employee desiring to enter was prevented from doing so. The picketing was not similar to that in *W. R. Rawleigh Co.* v. *NLRB*, 190 F.2d 832 (7th Cir. 1951), cited to the argument, where this court vacated a Board order of reinstatement. In *Rawleigh*, delivery and shipment of property was impeded, and nonstriking employees were unable to enter the plant for more than a month because of the "breast to back" picketing technique and were repelled by physical force if they attempted to enter. *Id.* at 840.

Whether or not the November 19 and 20 conduct was protected under section 7, we think the Board was justified in ordering reinstatement of the employees involved. Section 10(c) provides that the Board has power to order reinstatement as a remedy for employer unfair labor practices if the order will effectuate the policies of the Taft-Hartley Act and if the employees to be reinstated were not discharged "for cause." As the court said in *NLRB* v. *Thayer Co.*, 213 F.2d 748, 753 n.6 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954):

> [A] determination that an employee is not engaged in a § 7 activity does not necessarily mean that, if he is discharged for his participation in the unprotected action, the discharge is "for cause." That depends on the surrounding circumstances. What is *cause* in one situation may not be in another. (Italics in original.)

The November 19 strike was triggered by the discharge of employee Paris after other discriminatory discharges and coercive conduct. The strike and the picketing were caused by Golay's "massive" unfair labor practices. Balancing the strikers' conduct against Golay's, *NLRB* v. *Thayer Co.*, 213 F.2d at 753, we agree with the Board that the "misconduct was not of such a serious nature in the total circumstances of this case as to warrant denial of their reinstatement."

No. 15656

The Board ordered reinstatement of the forty-two employees discharged or refused reinstatement because of the strike and picketing and ordered Golay to make them whole for loss of wages commencing March 25, 1963, when it received a letter signed by the employees seeking reinstatement.[3] The Union contends that the loss of wages

[3] The Board found that five of the forty-two had made earlier unconditional offers to return and that five others did likewise on dates not fixed by the record. The Board ordered computation of back pay for them from those dates, leaving for compliance the determination of the dates with respect to the latter five.

should be measured from November 19, 1962, when it insists the employees were entitled to be reinstated.

The Union's contention rests in part upon the statement made by a Union representative to a Golay official on the afternoon of the strike that "you are able to settle this in a very few minutes . . . and return the people to their jobs." We see no merit in this contention. We think the Board properly found that this statement was not an unconditional offer by the employees to return to work. The obligation to reinstate arose upon receipt of the unequivocal request signed by the employees, which was the first authoritative, unequivocal request made to Golay.

The Union also claims that unlawfully discharged employees are not required to ask for reinstatement and that participation in an unfair labor practice strike does not necessarily defeat the right to back pay. We agree. But in fashioning remedies for unfair labor practices, the Board has discretion under section 10(c) to order reinstatement with or without back pay "as will effectuate the policies" of the Act under the circumstances of a particular case. *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 198-99 (1941); *Bon Hennings Logging Co.* v. *NLRB,* 308 F.2d 548, 555-58 (9th Cir. 1962). We see no abuse of discretion in the Board's choice of dates with respect to back pay.

The Board's order will be enforced, as modified.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Thursday, December 1, 1966
Before
Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

GOLAY & CO., INC., *Petitioner,*

No. 15540 vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, *Petitioner,*

No. 15656 vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petitions to review and cross-petition to enforce an order of the National Labor Relations Board.

This cause came on to be heard on the petitions to review and cross-petition to enforce an order of the National Labor Relations Board, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the National Labor

Relations Board on February 4, 1966, be modified in accordance with the opinion of this Court filed this day, and as so modified, the order will be enforced. Upon presentation, an appropriate decree will be entered.

APPENDIX C

In the United States Court of Appeals
For the Seventh Circuit

Monday, February 6, 1967

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

GOLAY & CO., INC., *Petitioner,*

No. 15540 vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for review of an order of the National Labor Relations Board.

It Is Ordered that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

In the

United States Court of Appeals

For the Seventh Circuit

Monday, February 6, 1967

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

GOLAY & CO., INC.,
Petitioner,
No. 15540 vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for review of an order of the National Labor Relations Board.

It Is Ordered by the Court that the petition for rehearing *en banc* of the above entitled cause be, and the same is hereby DENIED.

APPENDIX D

In the United States Court of Appeals For the Seventh Circuit

GOLAY & CO., INC.,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 15540

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 15656

DECREE
(Filed February 8, 1967)

Before: HASTINGS, *Chief Judge,* KILEY and CUMMINGS, *Circuit Judges.*

The above consolidated causes came on to be heard upon petitions to review and a cross-petition to enforce an Order of the National Labor Relations Board, dated Febru-

ary 4, 1966, and corrected February 14, 1966, directed against Golay & Co., Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on September 28, 1966, and has considered the briefs and transcript of record filed in these causes. On December 1, 1966, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

Ordered, Adjudged And Decreed by the United States Court of Appeals for the Seventh Circuit that Golay & Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW AFL-CIO, hereinafter called UAW, or in any other labor organization, by discharging employees, or in any other manner discriminating against them in regard to their hire or tenure of employment or any other term or condition of employment.

(b) Discharging employees for engaging in lawful strikes, picketing, and other lawful protected and concerted activities, or for respecting and honoring lawful picket lines.

(c) Refusing to employ or recall employees for engaging in lawful protected and concerted activities.

(d) Interrogating its employees concerning their own and other employees' membership in, activities on behalf of, and sympathies for the UAW, or any other labor organization, in a manner constituting interference, restraint, or coercion.

(e) Engaging in surveillance and also asking its employees to engage in surveillance of the UAW, or any other labor organization, and to report on the union activities and sentiments of their fellow employees.

(f) Threatening its employees with discharge, layoff, loss of overtime, closing, selling, moving, or ter-

minating its operations if they joined, designated or assisted the UAW, or any other labor organization.

(g) Granting or promising its employees economic benefits if they refrained from becoming or remaining members of the UAW, or any other labor organization, or if they refrained from giving such labor organization assistance and support.

(h) Attempting to form a labor organization among its employees.

(i) Interfering with the right of employees to wear union insignia.

(j) In any other manner interfering with, restraining, or coercing employees in the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.

2. Take the following affirmative action the Board has found necessary to effectuate the policies of the Act:

(a) Offer the employees named below in this paragraph immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each of them whole for any loss of pay, plus interest at the rate of 6 percentum per annum, which they may have suffered by reason of the discrimination against them:

Baker, Marion K.
Blair, Earl R.
Caudill, James
Cecil, Henry Jr.,
Chaney, Walter H.
Clemons, William
Cornet, Harold
Dillman, George
Jones, Walter L.
Keal, Ronald L.
Lawrence, Robert
Meyer, Robert
Mills, Willie Joe
Nash, Charles
Nick, Robert Lee
O'Dear, Billy

Durham, Howard
Eldridge, George
Ford, Earl
Fowler, Bivon
Fowler, Kenneth
Fox, John H.
Frady, Marvin
Goble, Gerald
Hall, Benny
Harrison, Thomas J.
Herbert, Edward
Isaacs, Robert
James, Jesse
Jamison, John
Paris, Paul
Pebworth, Lester
Powell, James
Purvis, Donnie Ray
Raby, James
Raby, John
Sams, Paul
Steele, James
Toney, Richard
Transier, Andrew
Tyree, Billy
Vickers, Delbert
Winchester, James
Wyramon, Carl

(b) To the extent they have not already done so, offer to reinstate Walter Heaston and Melvin Moistner, to their former or substantially equivalent positions without prejudice to their respective seniority or other rights and privileges, and make each of them whole in the manner described in the Remedy section, of the Board's Decision and Order, for any loss of earnings they may have sustained in the interim between the respective dates of their discharge or layoff and December 3, 1962.

(c) Notify the above-named individuals if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payments, records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Decree.

(e) Post at its plants in the vicinity of Cambridge City, Indiana, copies of the notice attached hereto as "Appendix." Copies of said notice, to be furnished by the Regional Director, of the National Labor Relations Board for the Twenty-fifth Region, (Indianapolis, Indiana), after being signed by a duly authorized agent of Golay & Co., Inc., shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree, what steps the Golay & Co., Inc. has taken to comply herewith.

/s/ Roger J. Kiley
Judge, United States Court of Appeals for the Seventh Circuit

/s/ John S. Hastings
Judge, United States Court of Appeals for the Seventh Circuit

/s/ Walter J. Cummings, Jr.
Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:
Teste:

/s/ Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby, notify you that:

WE WILL not unlawfully interrogate our employees concerning their own and other employees' union membership, activities, or desires, or threaten them with discharge or reprisals for engaging in activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO, or any other labor organization, or promise or grant them benefits for the purpose of discouraging their union activities.

WE WILL NOT engage in surveillance of the union activities of our employees or ask them to engage in surveillance and report to us on the union activities and sentiments of their fellow employees.

WE WILL NOT threaten to close, sell, move, or terminate our operations if our employees join, designate, or assist the above named UAW or any other labor organization as their collective-bargaining agent; nor will we attempt to form or organize a labor organization for our employees.

WE WILL NOT interfere with the right of our employees to wear union insignia.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to join or assist the above-named union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and will make them whole for any loss of pay, plus interest at the rate of 6 percentum per annum, which they may have suffered by reason of the discrimination against them:

Baker, Marion K.	Jones, Walter
Blair, Earl R.	Keal, Ronald L.
Caudill, James	Lawrence, Robert
Cecil, Henry Jr.	Meyer, Robert
Chaney, Walter H.	Mills, Willie Joe
Clemons, William	Nash, Charles
Cornet, Harold	Nick, Robert Lee
Dillman, George	O'Dear, Billy
Durham, Howard	Paris, Paul
Eldridge, George	Pebworth, Lester
Ford, Earl	Powell, James
Fowler, Bivon	Purvis, Donnie Ray
Fowler, Kenneth	Raby, James
Fox, John H.	Raby, John
Frady, Marvin	Sams, Paul
Goble, Gerald	Steele, James
Hall, Benny	Toney, Richard
Harrison, Thomas J.	Transier, Andrew
Herbert, Edward	Tyree, Billy
Isaacs, Robert	Vickers, Delbert
James, Jesse	Winchester, James
Jamison, John	Wyramon, Carl

WE WILL make whole Walter Heaston and Melvin Moistner for any loss of earnings they sustained by reason of our discrimination against them.

All our employees are free to become or remain or refrain from becoming or remaining members of the above-named or any other labor organization.

Golay & Co., Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

NOTE: We will notify any of the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis 4, Indiana (Tel. No. Melrose 3-8921), if they have any question concerning this notice or compliance with its provisions.

APPENDIX E

Labor Management Relations Act (Taft-Hartley Act) §8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. §158(a)(3) (1964):

> "It shall be an unfair labor practice for an employer— by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

Labor Management Relations Act (Taft-Hartley Act) §10(c), 61 Stat. 147 (1947), 29 U.S.C. §160(c) (1964):

> "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ."